

<b>TRENT-JONES, INC.,</b>	)	<b>AGBCA No. 98-104-1</b>
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Appellant	)	
	)	
<b>Representing the Appellant:</b>	)	
	)	
Kevin P. Breslin	)	
Rusty A. Payton	)	
Jeffrey H. Bunn	)	
Katz Randall & Winberg	)	
333 West Wacker Drive, Suite 1800	)	
Chicago, Illinois 60606	)	
	)	
<b>Representing the Government:</b>	)	
	)	
Daniel N. Hylton	)	
Office of the General Counsel	)	
U.S. Department of Agriculture	)	
South Building, Room 2321	)	
1400 Independence Avenue, S.W.	)	
Washington, D.C. 20250	)	

**DECISION OF THE BOARD OF CONTRACT APPEALS**

December 29, 1998

**OPINION BY ADMINISTRATIVE JUDGE JOSEPH A. VERGILIO**

Trent-Jones, Inc. (Appellant), of Princeton, New Jersey, had a contract with the United Soybean Board (USB). On October 23, 1997, Trent-Jones filed with this Board a “notice of appeal” involving a claim against the USB and a decision by the Director, Agricultural Marketing Service, of the U. S. Department of Agriculture (USDA) (Government) that the Contract Disputes Act (CDA), as amended, 41 U.S.C. §§ 601-613 (1994), does not apply to the contract at issue. Trent-Jones asserts that Board jurisdiction exists under the CDA. Contending that the contract is outside the scope of the CDA, the Government moves to dismiss this matter for lack of jurisdiction. Written submissions by the parties addressed the issue of Board jurisdiction.

Trent-Jones bears the burden of establishing jurisdiction. The record reveals that the USB is a nonappropriated fund activity established by the USDA, with the USB the contracting entity with Trent-Jones. No other part of the USDA is a party to the contract, which is financed solely through nonappropriated funds. The CDA does not apply to the underlying contract of a nonappropriated fund activity. The Board lacks jurisdiction under the CDA to resolve the matter in dispute. Therefore, the Board grants the motion of the Government and dismisses the matter for lack of jurisdiction.

**FINDINGS OF FACT**The contract

1. Trent-Jones entered into a cost-reimbursement contract (styled as a “funding agreement”) with the USB, under which Trent-Jones would provide the USB with producer communication and related services for the fiscal year October 1, 1994, through September 30, 1995. (Agency Submission (Sept. 24, 1998), Enclosure 1, at 1 (¶¶ I, II.2, II.3).) The agreement specifies that it “shall become effective only upon the approval of this Agreement by the United States Department of Agriculture.” (Id. at 7-8 (¶ V.8).) On September 16, 1994, the USDA approved the agreement, as indicated in an attachment to the agreement. The USDA was not a signatory to the agreement. (Id., Enclosure 1, Exhibit 1.)
2. The contract specifies that Trent-Jones shall keep and retain accurate records, books, documents and papers involving transactions under the agreement. The “records shall be subject to inspection and audit by designated representatives of the Secretary of Agriculture of the United States or by designated representatives of the [USB].” (Agency Submission (Sept. 24, 1998), Enclosure 1, at 3 (¶ III.3).) The contract further specifies that subcontracts are to contain a clause to the effect that the USB, the USDA, and any of their duly authorized representatives, shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of the subcontractor. (Id. at 4 (¶ III.4).)
3. The contract recognizes that it may be modified or extended by mutual agreement. Such a modification or extension shall be in writing and is subject to the approval of the Secretary of Agriculture. (Agency Submission (Sept. 24, 1998), Enclosure 1, at 5 (¶ III.6).)
4. The contract specifies that it “may be terminated by either party hereto, or the Secretary of Agriculture,” upon certain conditions. (Agency Submission (Sept. 24, 1998), Enclosure 1, at 7 (¶ V.4).)
5. The existing record does not indicate the nature of the disagreement between Trent-Jones and the USB. However, by letter dated July 23, 1997, the Director, Agricultural Marketing Service, informed Trent-Jones that he had received claims by Trent-Jones against the USB, and had concluded that the CDA does not apply to the matter because the USB is not an executive agency under the CDA.
6. On October 23, 1997, the Board received the “notice of appeal” submitted by Trent-Jones disputing the determination by the USDA.

The United Soybean Board

7. The Secretary of Agriculture established the USB pursuant to the directives of the Soybean Promotion, Research, and Consumer Information Act, Pub. L. No. 101-624, §§ 1966-1976, 104 Stat. 3881-3904 (1990) (Soybean Act). (7 U.S.C. §§ 6301-6311.<sup>1</sup>) Statute requires the Secretary of Agriculture to issue orders to effectuate an expressed policy regarding soybeans and soybean products; namely:

Congress declares that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through assessments on domestically-produced soybeans, and implementing a program of promotion, research, consumer information, and industry information designed to strengthen the soybean industry's position in the marketplace, to maintain and expand existing domestic and foreign markets and uses for soybeans and soybean products, and to develop new markets and uses for soybeans and soybean products.

(Id. §§ 6301(b), 6303(a) (emphasis added).)

8. The Secretary shall appoint members (who are soybean producers) to the USB which is to administer the order. (Id. § 6303(b)(1).) Although statute authorizes funds to be appropriated as are necessary to carry out the Soybean Act, appropriated funds shall not be available for payment of the expenses or expenditures of the USB in administering any provision of any order issued under the Soybean Act. (7 U.S.C. §§ 6311(a), (b).)

9. The law expressly provides the USB with the power and duty to contract with appropriate persons to implement plans or projects. (7 U.S.C. § 6304(c)(5).) The USB shall review or, on its own initiative, develop plans or projects of promotion, research, consumer information, and industry information to be paid for with funds received by the USB. The plans or projects do not become effective until approved by the Secretary of Agriculture. (Id. § 6304(f).) The USB is required to develop budgets of anticipated expenses and disbursements; it shall submit budgets (and any substantial modifications thereof) to the Secretary of Agriculture for approval. (Id. § 6304(e)(1).) Statute expressly recognizes a limitation on the budget of the USB: “No expenditure of funds may be made by the [USB] unless such expenditure is authorized under a budget or modification approved by the Secretary [of Agriculture].” (Id. § 6304(e)(2).)

10. Regarding USB contracts and agreements, the statute directs that the USB “may enter into contracts or agreements for the implementation and carrying out of the activities authorized by this chapter with national, nonprofit, producer-governed organizations that represent producers of

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<sup>1</sup> The Commodity Promotion, Research, and Information Act of 1996, Pub. L. No. 104-127, Title V, §§ 501-526, 110 Stat. 1029-48 (7 U.S.C. §§ 7401, 7411-7425), post-dates the contract at issue.

soybeans, and for the payment thereof with funds received by the [USB.]” (7 U.S.C. § 6304(j)(1).)<sup>2</sup> Statute also contains directives regarding the terms of any contract or agreement entered into by the USB. For example, a plan or project under a contract or agreement is effective only when approved by the Secretary of Agriculture. (*Id.* § 6304(j)(3)(B).)

11. The statute does not require the USDA to be a party to a contract entered into by the USB, although it does require USDA oversight and approval before a USB contract becomes effective.

#### USDA Order and Regulations Issued Pursuant to Statute

12. The USDA has issued an order and regulations pursuant to the Soybean Act, 7 U.S.C. §§ 6303, 6311(c). (7 CFR Part 1220 (1995).) The order specifies the powers of the USB, including that to “contract with Qualified State Soybean Boards to implement plans or projects.” (7 CFR § 1220.211(h).) Among the duties of the USB is the following:

With the approval of the Secretary, to enter into contracts or agreements with appropriate parties, including national nonprofit producer-governed organizations, for the development and conduct of activities authorized under § 1220.230 of this subpart and for the payment of the cost thereof with funds collected through assessments pursuant to § 1220.233. Provided, that the [USB] shall contract with only one national nonprofit producer-governed organization to administer all projects within a program area.

Any such contract or agreement shall provide that:

(1) The contractor shall develop and submit to the [USB] a plan or project together with a budget or budgets which shall show the estimated cost to be incurred for such plan or project;

(2) Any such plan or project shall become effective only upon approval of the Secretary; and

(3) The contracting party shall keep complete and accurate records of all of its transactions and make periodic reports to the [USB] of activities conducted pursuant to a contract and an accounting for funds received and expended, and such other reports as the Secretary or the [USB] may require. The [USB] and Secretary may audit the records of the contracting party periodically.

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<sup>2</sup> Given the conclusion that this Board lacks jurisdiction over this matter, this Board need not here determine if this provision restricts the parties with which the USB may contract, or if Trent-Jones is a permissible contracting party.

(7 CFR § 1220.212(h).) The regulations do not require that the USDA be a party to any contract entered into by the USB.

## DISCUSSION

Trent-Jones bears the burden of establishing that this Board has jurisdiction over the matter. See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). A review of the statute under which the USDA created the USB, the implementing orders and regulations, the CDA, and the underlying contract reveals that the Board lacks jurisdiction over this matter.

The CDA “applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for,” among other items, the procurement of services. (41 U.S.C. § 602(a)). As applicable,

the term “executive agency” means an executive department as defined in section 101 of Title 5, an independent establishment as defined by section 104 of Title 5 (except that it shall not include the General Accounting Office), a military department as defined by section 102 of Title 5, and a wholly owned Government corporation as defined by section 9101(3) of Title 31, the United States Postal Service, and the Postal Rate Commission[.<sup>3</sup>]

(41 U.S.C. § 601(2).)

The Department of Agriculture is an executive department. (5 U.S.C. § 101.) The USDA created the USB, which the USDA controls and supervises, under statute and regulatory order. The USB operates through nonappropriated funds—assessments on domestically produced soybeans.

The nonappropriated fund activities described in sections 1346 and 1491 of Title 28, U.S.C., are limited by the language of those provisions to various Exchanges in the military or in the National Aeronautics and Space Administration (NASA). In McDonald’s Corp. v. United States, 926 F.2d 1126, 1132-33 (Fed. Cir. 1991), the Court discusses the waiver of sovereign immunity regarding nonappropriated fund activities and the language of 28 U.S.C. § 1491(a)(1):

A more sensible reading of the comprehensive and categorical listing in the statute is that found in the legislative history, where Congress indicated its intention to limit

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<sup>3</sup> In the CDA context, an “independent establishment” means “an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government Corporation, or part thereof, or part of an independent establishment[.]” (Id. § 104.) The phrase “independent establishment” includes, for example, the National Aeronautics and Space Administration (42 U.S.C. § 2472), the General Services Administration (40 U.S.C. § 751), and the National Archives and Records Administration (44 U.S.C. § 2102). The USB is not an independent establishment. The phrase “wholly owned Government corporation” includes the Commodity Credit Corporation and the Federal Crop Insurance Corporation; the USB is not such an entity. (31 U.S.C. § 9101(3)(A), (D) (1994).)

the waiver of sovereign immunity to a specific category of military organizations funded by resale activities which rendered them solvent and therefore able to support an adverse judgment without risk to the general treasury.

The CDA does not apply to a contract solely with a nonappropriated fund activity existing outside of the military and NASA. Statute expressly empowers the USB to enter into contracts. While USDA has fiscal and contractual oversight responsibilities regarding the USB, such is not enough to make this other than a contract of a nonappropriated fund activity.

This matter involves a contract between Trent-Jones and only the USB, an activity which operates using nonappropriated funds. No other portion of the USDA is a party to the contract. As noted above, the pertinent statutes, order, and regulations do not require the USDA to be a party to a USB contract. Had a portion of the USDA in addition to (or instead of) the USB been a party to the contract, the CDA would apply; however, the sole governmental contracting party in this particular matter is a nonappropriated fund activity to which the CDA does not apply.

**DECISION**

The Board grants the motion of the Government; this matter is dismissed for lack of jurisdiction.

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**JOSEPH A. VERGILIO**

Administrative Judge

Concurring:

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**EDWARD HOURY**

Administrative Judge

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**HOWARD A. POLLACK**

Administrative Judge

Issued at Washington, D.C.  
December 29, 1998